

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

ALBERTSON'S, INC.,

Employer,

and

Case 27-RC-8373

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 368A

Petitioner.

DECISION AND DIRECTION OF ELECTION

On February 25, 2005, the Petitioner, United Food and Commercial Workers Union, Local 368A, filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent certain employees of the Employer, Albertson's, Inc. On March 14, 2005, a hearing was held before Hearing Officer Nancy S. Brandt. At hearing, the parties stipulated to the following bargaining unit:

Included: All full-time and regular part-time grocery clerks, produce clerks, scan clerks, general merchandise clerks and general merchandise manager, bakery department clerks and cake decorators, service deli clerks, service supervisor personnel coordinators, formerly bookkeepers, scan coordinators, customer service center clerks and courtesy clerks employed at Store No. 180 in Meridian, Idaho.

Excluded: All meat department employees, pharmacy employees, store director, assistant store director, third person, service operations manager, service deli manager, customer service center supervisor, produce manager, bakery manager, office clerical employees, janitors,

guards, professional employees, confidential employees, other supervisors as defined in the Act and all other employees.¹

Following the hearing, the parties filed timely briefs. The issue in this case involves the supervisory status of two job classifications, the Service Operations Assistant Manager (“SOA”) and Service Supervisors (“SS”). The Employer contends that the individuals holding these positions are statutory supervisors, while the Petitioner maintains they are employees.

For the reasons discussed below, I conclude that the SOA and SS are not statutory supervisors who must be excluded from the bargaining unit. Accordingly, these positions shall be included in the appropriate unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to me. Upon the entire record in this case, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, I find that the Employer is a Delaware corporation, with a principal office and place of business in Boise, Idaho, where it is engaged in the business of operating retail grocery stores and warehouses, including Store No. 180 in Meridian, Idaho, at issue herein. During the course and conduct of its business operations, the Employer annually derives

¹ The parties agreed that the “Fourth and Fifth Person” positions will be addressed through challenged ballots if necessary.

gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$5,000 directly from sources located outside the State of Idaho.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. It is appropriate to direct an election in the following unit of employees:

Included: All full-time and regular part-time grocery clerks, produce clerks, scan clerks, general merchandise clerks and general merchandise manager, bakery department clerks and cake decorators, service deli clerks, service operations assistant managers, service supervisors, service supervisor personnel coordinators (formerly bookkeepers), scan coordinators, customer service center clerks and courtesy clerks employed at Store No. 180 in Meridian, Idaho.

Excluded: All meat department employees, pharmacy employees, store director, assistant store director, third person, service operations manager, service deli manager, customer service center supervisor, produce manager, bakery manager, office clerical employees, janitors, guards, professional employees, confidential employees, supervisors as defined in the Act and all other employees.

FACTS

The Service Operations Manager ("SOM") Darcy Layman is responsible for the overall supervision of the front end of the Employer's Store 180 at issue in the instant case. In describing her duties, Ms. Layman testified that she ensures customer service in the front end, directs cashiers and customers, writes schedules, and oversees all the money and service for the entire store. The parties stipulated that Ms. Layman is a statutory supervisor and the record

supports the parties' agreement on this issue. Ms. Layman testified that she has been the SOM at Store 180 for eight or nine months, since approximately June or July, 2004. Ms. Layman reports to the Store Director. Individuals occupying all of the front end job classifications, the SOA, SSs, Service Supervisor/Personnel Coordinators ("SS/PC"),² courtesy clerks and cashiers, report to Ms. Layman. Kalleen Gould is the only SOA in the store. There are two SSs, Alesha Barron and Kathy Nakagawa, two SS/PCs, between nine and ten cashiers, and between eight and ten courtesy clerks. The store hours are from 6:00 a.m. – midnight. Ms. Layman typically works Tuesday – Saturday from 8:00 a.m. - 5:00 p.m. When Ms. Layman is not working, SOA Kalleen Gould, or one of the SSs, Kathy Nakagawa or Alesha Barron, is in charge of the front end. Ms. Gould is scheduled as an SOA and runs the front end during the day on Mondays. She also works half of her shift as SOA on Tuesdays. Ms. Gould works as a cashier during the other half of her shift on Tuesday and on her two other workdays during the week.³ Although Ms. Layman works on Tuesdays, she is primarily occupied with paperwork and other duties that day.

When Ms. Layman and Ms. Gould are not working, an SS is in charge of the front end. Kathy Nakagawa usually works as an SS 2-3 evenings a week, from 4:00 p.m. -1:00 a.m. She is then scheduled as a cashier 2-3 shifts per week. Alesha Barron works a similar number of her shifts as an SS, with the remainder of her shifts as a checker.

² The parties have stipulated that this is a non-supervisory position and that the SS/PCs should be included in the bargaining unit.

The SOA and SSs wear a “manager” uniform, which is a light blue button down shirt, rather than the blue polo shirt and apron worn by cashiers and courtesy clerks. The SOA and SSs are paid hourly at the regular cashier rate, regardless of whether they are scheduled as cashiers or running the front end. SOM Layman is paid hourly as well, but at a higher wage, and she also receives bonuses.

Service Operations Assistant (SOA)

SOA Kalleen Gould fills in for the SOM when she is not working or is otherwise occupied. In this respect, Ms. Gould runs the front-end, but does not necessarily perform all of Ms. Layman’s regular SOM functions.

The record testimony regarding Ms. Gould’ hiring authority is inconsistent. SOM Layman generally testified that Ms. Gould has been designated the authority exclusively to hire courtesy clerks and assists with cashier hiring.⁴ As to the hiring process, Ms. Layman testified that both she and Ms. Gould pull computerized applications from the kiosk in the front lobby. According to Ms. Layman, Ms. Gould sets up and conducts the interviews, and if she feels the applicant is right, she is authorized to extend him an offer of employment, contingent upon passing drug and background checks. However, Ms. Gould testified that she does not hire courtesy clerks without Ms. Layman’s involvement, nor does she feel she has the authority to do so. Ms. Gould testified that management advises her when there is a need to hire. She then

³ Ms. Gould testified that she used to work as an SOA on Sundays, but had recently been off on Sundays at her request. She expected to return to her regular schedule after Easter.

⁴ There is no evidence in the record regarding Ms. Gould’s involvement with hiring cashiers.

reviews applications with a member of management. According to Ms. Gould, interviews are normally conducted with Ms. Layman being present. While Ms. Gould has conducted one or two interviews by herself, in those instances, she has not extended an offer of employment. Rather, she has had the applicant come back to interview with Ms. Layman. The only record evidence regarding the hiring of a specific courtesy clerk is that the last one hired was hired by the Store Director.

The only situation in which Ms. Gould testified that she was given the authority to hire courtesy clerks occurred when Ms. Layman was “gone.”⁵ She testified that she exercised that authority “when I was actually doing that,” but gave no examples or further information on this point. Ms. Gould testified that on the day of the hearing, she was setting up an interview for a female courtesy clerk for the following day. Ms. Layman would be unable to attend the interview because she was to be in training on the day of the interview. Ms. Gould merely stated that she would be interviewing the applicant and gave no indication as to what process would follow this interview.

Regarding employee promotions, the only record evidence on this topic is that Ms. Gould had a discussion with Ms. Layman about two cashiers who were promoted to be Service Supervisors at another store. Ms. Layman testified that she became aware that the employees were interested in moving up and that

⁵ While unclear when or how long Ms. Layman was “gone,” the record indicates that it was at least part of September, 2004, based upon Ms. Gould’s testimony that she also wrote the schedule while Ms. Layman was out of the store for “Scott’s training.” The time period in which Ms. Layman was “gone” could have been up to several months, based upon her testimony that Ms. Gould wrote the schedule for the first five months Ms. Layman was at Store 180.

she had solicited input from the assistants at Store 180 about how they thought these employees would perform, if promoted. In this case, the feedback was positive and the employees were promoted.

Regarding employee discipline, Ms. Gould was apparently told by a different front end manager at an unknown time that she had the authority to write up an employee. According to Ms. Gould, she and Ms. Layman have never discussed the extent of her authority to discipline, and she generally does not exercise such authority. The only specific evidence in this regard was an occasion on which Ms. Gould issued a written warning to an employee for a WIC check violation at the direction of the Store Director. The record indicates that the Store Director told Ms. Gould about the violation, gave her the disciplinary form, and told her to fill it out, which she did. Ms. Gould then met with the employee to go over the form, but did not sign the form.

Ms. Gould also testified that she has the authority to send employees home if they are not properly attired. She stated that if an employee came to work out of uniform, she would tell him or her to go home and change and come back, or to come back and talk to the Store Director or the SOM. There are no specific examples in the record of such an occurrence.

As for Ms. Gould's ability to assign and direct work, the record reveals that when she is in charge of the front end, she is responsible for sending employees on their breaks and lunches, and making sure the appropriate number and type of check stands are open. If the front end is slow, she can also direct employees to do other tasks, such as sweeping or cleaning.

Ms. Layman currently writes the schedules for the front end, although, as discussed above, there was a time last year while Ms. Layman was out of the store last year doing training, that Ms. Gould did the scheduling. Ms. Gould has the authority to change the schedule if two employees agree that they want to switch shifts, although she testified that she does not do this very often. Ms. Gould can also ask an employee to come in early or stay late to cover a shift when another employee has called in sick. She has approved overtime only in emergency situations and has not done this in the last six months.

Ms. Gould also participates in training for new courtesy clerks. In doing so, she has the new hires shadow a seasoned clerk for a couple of days on the job. She testified that has not trained a cashier in years. Ms. Gould also conducts safety training (which last for approximately ½ hr.) with new employees, and she signs off on the “safety training checklist” when the training is completed. She participates in on-going training by ensuring that employees watch training videos that are sent to the store and having them “read and sign” any policy changes for the front end. Ms. Gould also participated in bagging training during a recent promotion, whereby the associate bagged groceries and was then given a checklist to sign off on regarding proper bagging technique.

Service Supervisor (SS)

The SS is in charge of the front end when the SOM and SOA are not present, primarily in the evenings. The SSs perform the same main functions as the SOA on the front end, i.e. they monitor the flow of work and ensure that the

appropriate number and type of checkstands are open, tell cashiers which checkstands to work in, and send employees on breaks and lunches.

As for additional direction or assignment of work, Ms. Nakagawa testified that she cannot assign cashiers to do other work and never has. The courtesy clerks have a list of duties to perform each shift, and the SS makes sure they do them. If traffic in the front end is slow, the SS can have the courtesy clerks perform tasks such as cleaning the restroom, retrieving carts from the parking lot or helping grocery.

The SSs are not involved in the hiring or transfer of employees. Regarding promotions, there were two occasions in which Ms. Barron apparently gave her opinion to Ms. Layman regarding employees seeking promotions, although she testified that she was not asked for her opinion in even these instances. On one such occasion, as she was starting work and Ms. Layman was going home, Ms. Barron mentioned that it would be good for "Grant from the lobby" to be a cashier. There are no further details on this situation. On another occasion, Ms. Barron told Ms. Layman that she thought a cashier (Chris Torres) would be a good SS. Regarding such promotions, Ms. Layman testified that she liked the SSs to tell her about their opinions on such things and that she valued them.

There is no evidence in the record that an SS has ever disciplined an employee, or that they have the authority to do so. There was one occasion in which Ms. Barron told a courtesy clerk who was wearing jeans that he had to go home and change. In addition, there was an incident in which Ms. Barron asked

the grocery manager to send a courtesy clerk home for using a cell phone in the parking lot. This apparently was done, however no further details appear in the record.

The SSs do not write the schedules, however they can, like the SOA, call employees in or extend shifts in an emergency situation, such as if someone calls in sick. The SSs can override the computerized time clock to allow employees to punch in and out under these circumstances. They can also change the schedule if two cashiers wanted to trade shifts. If business is slow, the SSs can send cashiers home early. Ms. Nakagawa testified that when this occurs, she sends home the next one scheduled to leave. Ms. Nakagawa further testified that she does not authorize overtime, because she has been told that employees cannot have any overtime. Ms. Barron testified that on occasion, if she just cannot get someone out on time because it's too busy, the employee will stay and get overtime until she can get them out.

The SSs are responsible for performing "till spot checks" and "operator reviews" on cashiers. The SOM or SOA oversees that these items are being done, but does not direct the SSs specifically on doing them. The "till spot checks," which are usually performed three times a week, involve the cashier's till being audited to make sure it is accurate as verified against the computer. If there is a problem, the SS can inform the cashier of it. The results of the checks are placed on a clipboard for the bookkeeper. The operator reviews are done monthly on each cashier to check for compliance with the Employer's check-out procedures. For example, the SS ensures that the cashier has signed in and out

properly, signed for pick-ups and issues, filled out paperwork, processed checks properly and kept the till organized. Discipline is not issued as a result of the reviews; however, the SS can point out problems to the cashier and can also note positive comments on the review. After the operator reviews are signed by the SS, they are placed on a clip board for the bookkeeper as well.

ANALYSIS AND FINDINGS

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This section reads in the disjunctive, and an individual need only possess one of the enumerated authorities to render that individual a supervisor. See **KGW-TV**, 329 NLRB 378 (1999); **Providence Hospital**, 320 NLRB 717 (1996). An individual possessing Section 2(11) supervisory indicia must exercise authority in a manner which is not merely routine or clerical in nature, and only individuals with genuine management prerogatives are to be considered supervisors as opposed to lead men and other minor supervisory employees. **Panaro & Grimes, d/b/a Azusa Ranch Market**, 321 NLRB 811 (1996).

The burden of proving supervisory status lies with the party asserting that such status exists. **NLRB v. Kentucky River Community Care, Inc.**, 532 U.S. 706 (2001). The Board has been careful not to construe the language of the statute relating to supervisory status too broadly, because once an individual

is found to be a supervisor, that individual is denied the rights of employees protected by the Act. **St. Francis Medical Center-West**, 323 NLRB 1046 (1997); **Hydro Conduit Corporation**, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with genuine management prerogatives should be considered supervisors and not straw bosses, leadmen, set-up men and other minor supervisory employees. **Panaro & Grimes, d/b/a Azusa Ranch Market**, 321 NLRB 811 (1996); **KGW-TV**, 329 NLRB 378 (1999); **Chicago Metallic Corporation**, 273 NLRB 1677, 1668 (1985), aff'd in relevant part 794 F.2d 527 (9th Cir.1986). "Because the Act excludes any 'supervisor' of the employer from the definition of 'employee' entitled to the Act's protections, the Board has a duty not to construe supervisory status too broadly. **Wal-Mart Stores, Inc.**, 340 NLRB No. 31, 5 (2003). Finally, "Wherever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria." **Dino & Sons Realty Corp.**, 330 NLRB 680, 688 (2000). See also, **Davis Memorial Goodwill Industries**, 318 NLRB 1044 (1995); **Phelps Community Medical Center**, 295 NLRB 486, 490 (1989).

In addition, in close cases of determining supervisory status, the Board looks to certain secondary indicia, including, among other things, job title or designation as supervisor, whether the individual is perceived as supervisor by employees, attendance at supervisory meetings, job responsibility, authority to grant time off, etc. **Dino and Sons Realty Corp.**, 330 NLRB 680 (2000). However, absent evidence that an individual possesses any one of the primary

indicia for supervisory status, the secondary indicia are insufficient by themselves to establish supervisory status. **JC Brock Corp.**, 314 NLRB 157, 159 (1994).

Supervisory Status of SOA Kalleen Gould

Based upon the entire record and applicable legal authority cited herein, I find that the Employer has failed to meet its burden of establishing that the SOA is a statutory supervisor. The Employer asserts that Kalleen Gould is a statutory supervisor because she 1) regularly performs the same duties and exercises the same kinds of authority as the SOM Darcy Layman; 2) has and exercises authority to hire; 3) has the authority to discipline and/or suspend employees; and 4) has authority to assign employees and direct their work.

Contrary to the Employer's assertion, the record evidence does not support a finding that Ms. Gould performs the same duties and exercises the same authority as the SOM when she fills in for Ms. Layman on her days off. "An employee who substitutes for a supervisor may be deemed a supervisor if given supervisory authority when substituting and if the substitution is regular and substantial." **Rhode Island Hospital**, 313 NLRB 343, 348 (1993). However, substitution alone is insufficient to establish supervisory status. In order to be a supervisor, the person substituting must also possess statutory supervisory authority while substituting. **Bakersfield Californian**, 316 NLRB 1211 (1995). Thus, regardless of the frequency with which an employee substitutes for a statutory supervisor, if the employee does not exercise the supervisory statutory authority while doing so, he or she cannot be a supervisor under the Act.

Bakersfield Californian, supra. See also **Passavant Health Center**, 284 NLRB 887, 892 (1987); **The Boston Store**, 221 NLRB 1126, 1127 (1975).

While Ms. Gould regularly “substitutes” for Ms. Layman, the Employer has failed to show that she exercises the requisite supervisory authority when doing so to render her a statutory supervisor. At the time of the hearing in this case, Ms. Gould was working one and a half shifts per week as an SOA. It appears from the record that soon after the hearing, she likely would have returned to working Sundays as an SOA as well, thus giving her 2 ½ days as an SOA and 2 ½ as a cashier per week.

Specifically, I find that the Employer has failed to meet its burden in establishing that Ms. Gould can or does hire employees. Such authority is not established in the record, as the testimony on this topic is highly inconsistent. As discussed above, where the evidence on supervisory indicia is in conflict, the Board will not find supervisory status based on those indicia. **Dino & Sons Realty Corp.**, supra. See also, **Williamette Industries, Inc.**, 336 NLRB 743 (2001). Accordingly, while Ms. Layman makes a blanket assertion that Ms. Gould has been designated the authority to hire courtesy clerks, Ms. Gould testified to the contrary. Conclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority. **Tree-Free Fiber Co.**, 328 NLRB 389, 393 (1999); **Sears, Roebuck & Co.**, 304 NLRB 193 (1993). Ms. Gould testified without contradiction that she does not hire courtesy clerks without Ms. Layman’s involvement and that she does not feel

she has the authority to do so.⁶ The record indicates that in the one or two instances where Ms. Gould has interviewed courtesy clerks by herself, she did not extend offers of employment and had the applicants return to talk to Ms. Layman. There are no examples in the record wherein Ms. Gould actually hired an employee. This includes the time during which she was actually told she had the authority to hire while Ms. Layman was absent from the store for a period last year. The testimony on this was limited and there is no further explanation of this authority or any exercise thereof. Finally, the fact that Ms. Gould was going to interview a female courtesy clerk applicant the following day is not indicative of supervisory status. Ms. Gould was going to perform the interview, because Ms. Layman was unable to attend and there is no indication of what would occur following the interview. Therefore, the assumption cannot be made that Ms. Gould could have actually hired, or even effectively recommended the applicant.⁷

Similarly, the record is insufficient to support a finding that Ms. Gould can discipline or suspend employees. While Ms. Gould was apparently told at some unspecified point in time by a different front end manager that she had the authority to write up an employee, there is no evidence of such authority under the current situation. Moreover, even if she were informed that she had such

⁶ While Ms. Layman generally testified that Ms. Gould also assisted in cashier hiring, her participation was never examined in the record.

⁷ While not addressed by the Employer, the record evidence fails to indicate that Ms. Gould makes effective recommendations concerning hiring (aside from Ms. Layman's broad assertions). The Board has consistently applied the principle that authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors. **Children's Farm Home**, 324 NLRB 61 (1997); **Esco Corp.**, 298 NLRB 837, 839 (1990). However, the record evidence in the instant case fails to show that Ms. Gould interviews applicants that could be hired without further involvement or investigation by management.

authority, the mere issuance of a directive to an alleged supervisor setting forth supervisory authority is not indicative of his or her supervisory status. See **Bakersfield Californian**, supra. The only example in the record wherein Ms. Gould issued discipline to an employee occurred when Ms. Gould issued a write up to a cashier for a WIC check violation. However, in that circumstance, Ms. Gould testified that she had been directed by the Store Director to prepare the disciplinary action. She merely filled out a form and gave it to the employee. Contrary to the Employer's factual representations on brief, the record also fails to show that Ms. Gould wrote up an employee for drinking on the job at another store. In that circumstance, Ms. Gould testified that the employee had already been fired, and "we wrote it up." In further questioning, Ms. Gould stated that she was merely a witness to the employee's behavior and did not make any recommendations to management or participate in any discipline related to the incident.⁸

Finally, while the Employer attempts to label sending an employee home as a "suspension" because the employee could lose money if he failed to return properly dressed, such is clearly not the case. If an employee is sent home in such a situation, it is not documented in his or her file as a "suspension" under

⁸ There is testimony in the record regarding the SOA and SSs ability to recommend employees for promotion. While the Employer makes no specific argument on brief regarding this purported authority, I note that the record fails to reveal that they exercise true supervisory power. As noted above, the Board has consistently applied the principle that the authority to effectively recommend means that the recommended action is taken without independent investigation by superiors. **Children's Farm Home**, 324 NLRB 61 (1997). The record evidence merely indicates that Ms. Layman asked Ms. Gould for her opinion about employees seeking promotions and that the employees were ultimately promoted. Such evidence does not indicate that employees were promoted solely based upon Ms. Gould's opinion. **Brown & Root, Inc.**, 414 NLRB 19, 21 (1994); **PHT, Inc.**, 297 NLRB 228, 234 (1989); and **The Ohio River Company**, 303 NLRB 696 n. 1 (1991).

the Employer's progressive discipline system, nor does the evidence indicate it is documented at all.

Even if sending an employee home is construed as discipline, the situation in the instant case does not confer supervisory status, as this would involve no discretion. Rather, Ms. Gould would merely be enforcing compliance with the Employer's established dress code, rather than exercising any genuine supervisory authority. Ms. Gould testified that she would send a clerk home to change, but if the clerk didn't want to go change and return, he would have to come back and talk to Ms. Layman or the Store Director. Accordingly, she would not be dealing with the situation beyond telling the employee to go home and change, and thus would not be exercising supervisory authority.

The Employer likewise fails to establish that Ms. Gould exercises independent judgment in directing and assigning employees. In **KGW-TV**, *supra*, the Board stated:

In applying the indicia of assignment and responsible direction in this case, however, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, and between the appearance of supervision and supervision in fact. Thus, it is well established that merely having the authority to assign work does not establish statutory supervisory authority. Further, not every act of assignment constitutes statutory supervisory authority. As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Similarly, even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience, and expertise does not translate into supervisory authority responsibly to direct other employees. [Citations omitted.]

The Employer in this case argues for supervisory status based upon the fact that Ms. Gould directs and assigns employees by deciding which check stands should be open, which employee should work in particular check stands, when employees should take breaks, whether they can leave early or stay late and whether they can trade shifts. However, there is nothing to indicate the direction or assignment of work by Ms. Gould is anything more than routine. See **Azusa Ranch Market**, *supra*; **Mack's Supermarkets**, 288 NLRB 1082 (1988). There is no evidence in the record to show the exercise of independent judgment in deciding which registers to open. Rather, it appears such a decision would be routine, depending on the time of day and customer flow. Moreover, on the days Ms. Gould currently works, there are only two or three cashiers working, leaving few options to exercise. Thus, Ms. Gould's assignment of cashiers to certain check stands appears to be routine, as demonstrated by her testimony indicating assignments are based upon the schedule, lunch, and break considerations. In the absence of record evidence to show that Ms. Gould has use independent judgment to cause workers to deviate from the usual routine in performing their duties, supervisory status cannot be established. **SDI Operating Partners**, 321 NLRB 111 (1996). See also, **First Western Building Services, Inc.**, 309 NLRB 591 (1992), and **Quandrex Environmental Co.**, 308 NLRB 101 (1992).

With regard to having employees leave early or stay late, the record merely indicates that Ms. Gould can ask employees to come in early or stay late in emergency situations, such as when someone calls in sick. There is no evidence that Ms. Gould can require anyone to alter their shift in this manner.

Such authority has been found insufficient to indicate supervisory status. **Azusa Ranch Market**, supra. Similarly, allowing employees to go home early when it is not busy confer supervisory status. **Smitty's Foods, Inc.**, 201 NLRB 283, 285-286 (1973). The same is true of Ms. Gould's infrequently exercised authority to allow two employees to trade shifts at their request. There is no evidence that she exercises any sort of judgment in approving such a mutually agreed upon trade. Rather, she indicates that it is just easier for her to switch it in advance so the managers do not have to go punch them in when they show up for a different shift.⁹

Supervisory Status of SSs Kathy Nakagawa and Alesha Barron

I also find that the Employer has failed to meet its burden of establishing that the two SSs, Kathy Nakagawa and Alesha Barron, are statutory supervisors. The Employer asserts that the SSs are supervisors because 1) they spend a regular and substantial amount of their time filling in for the SOM; 2) they direct employees and assign work duties and breaks; 3) they have and exercise the authority to discipline; 4) they are viewed as being in-charge; 5) they train employees; and 6) they audit employees' work.

As discussed above in relation to the SOA, the fact that the SSs fill in for the SOM alone is not indicative of supervisory status. **Bakersfield California**, supra; **Passavant Health Center**, supra. Thus, while the SSs fill in for Ms. Layman on an arguably regular basis, they cannot be supervisors under the Act

⁹ While the Employer does not make a specific argument regarding the SOA's authority to direct employees to clean or perform other tasks if business is slow on the front end, such authority has also been determined insufficient to confer supervisory status. See **Azusa Ranch Market**, supra.

unless they exercise actual Section 2(11) supervisory authority while doing so. The record does not support such a finding.¹⁰

First, the Employer's assertion that the SSs are supervisors because they direct employees and assign work duties and breaks is unsupported by the record. Their duties in this respect are the same as the SOAs. As in the case of the SOA, the Employer fails to demonstrate that the SSs exercise independent judgment in the assignment and direction of work.¹¹ As discussed above, these duties are routine in nature consisting of assigning cashiers to checkstands, sending them on breaks and lunches, and making sure there are enough checkstands open.¹² See **Azusa Ranch Market**, supra. Ms. Nakagawa's testimony also indicates that she cannot assign cashiers to do anything except operate a checkstand, that the courtesy clerks have a list of duties to perform each shift, and that she merely makes sure they get done.¹³

¹⁰ The Employer implies that the SSs should be considered supervisors because if they are not, the front-end would be without supervision for a good deal of the work week. First, this is not a primary indicia of supervisory status and cannot independently convert the SSs into supervisors. See **JC Brock Corp.**, 314 NLRB 157, 159 (1994). See also, **Northwest Nursing Home**, 313 NLRB 491, 500 (1993); **Ken-Crest Services**, 335 NLRB 16 n. 4 (2001). Second, the record indicates that at night, when the SSs are mainly in charge, there are only about 4-5 employees working on the front end, not 26 as in **Famous Amos Chocolate Chip Cookie Corp.**, 236 NLRB 1093 (1978), cited by the Employer on this point.

¹¹ This includes their ability to alter the schedule, which is apparently the same as the SOA's.

¹² The facts in **Famous Amos Chocolate Chip Cookie Corp.**, 236 NLRB 1093 (1978), relied upon by the Employer on brief, are distinguishable from those in the instant case. For example, in that case, the alleged supervisors had the authority to discipline, were paid more than other employees and were not required to punch a time clock like other employees.

¹³ As far as the SSs' authority to authorize overtime, Ms. Nakagawa testified that she does not do it, and Ms. Barron has had employees stay overtime only if it is so busy that she is unable to get them out on time. This is insufficient to show that they exercise independent judgment in authorizing overtime.

The Employer has also failed to prove that the SSs have or exercise the authority to discipline employees. While the SS can send an employee home for improper attire, as discussed above in relation to the SOA, the authority to send home an employee home to change clothes is not disciplinary and is merely an enforcement of established company policy requiring no exercise of independent judgment. In addition, the fact that Ms. Barron once asked the grocery manager to send a courtesy clerk home for using his cell phone in the parking lot does not show that she has the authority to discipline. In fact, there are no details in the record that that this circumstance demonstrated that Ms. Barron made an effective recommendation of discipline. The fact that Ms. Barron may have reported a rule infraction to upper management is not indicative of supervisory status. **Ryder Truck Rental, Inc.**, 326 NLRB No. 149 (1998); **TK Harvin & Sons, Inc.**, 316 NLRB 510, 530 (1995). Finally, the Employer's assertion on brief that the SSs have the authority to issue written warnings is wholly unsupported by the record. To the contrary, the SSs testified that they cannot issue, and have never been involved in issuing, written discipline to employees.¹⁴

In addition, the Employer argues on brief that the fact that the SSs are viewed as being "in charge" when the SOM or SOA are not present as being indicative of supervisory status. This is not a primary indicia of supervisory status, and cannot convert them into statutory supervisors. **JC Brock Corp.**,

¹⁴ While the Employer doesn't make a specific argument regarding the SSs ability to recommend promotions, the record evidence shows that Ms. Barron mentioned in passing that she thought one employee would make a good cashier and that another would be a good SS. This falls far short of the standard needed for an effective recommendation.

supra. The same is true for the fact that the SSs are involved in training employees.

Nor does the fact that they perform till spot checks and operator reviews convert them into statutory supervisors. The record is clear that these items do not result in discipline or reward, rather they are merely documented and given to the bookkeeper. The till checks and operator reviews are nothing more than standard quality checks mandated by the Employer's policies. Such quality control work, merely inspecting and reporting the work of others, is not supervisory. **Brown & Root, Inc.**, 314 NLRB 19, 21 fn. 6 (1994).

Based upon the foregoing, I find that the SOA and SSs are not supervisors under the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.¹⁵ Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those eligible to vote also include those who regularly average four hours per week for the last quarter prior to the eligibility date. Employees engaged in any economic

¹⁵ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

**UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 368A**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon*

Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **April 28, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **May 5, 2005**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 21st day of April 2005.

____/s/ Wayne L. Benson_____
Wayne L. Benson, Acting Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433